

Rule 10.5 — Transfer to another judge or county — Revised 1/2010

Once a party has requested a change of judge or a change of venue, the case then falls under the procedural requirements of Rule 10.5, Ariz. R. Crim. P.

That rule states:

a. Designation of New Judge. After a request under Rule 10.2 has been filed or a motion under Rules 10.1 or 10.3 granted, the case shall be transferred immediately to the presiding judge who shall reassign the case to a new judge. No further change of judge under Rule 10.2 shall be permitted to the party making such request. If there are multiple defendants, notice of change of judge by one or more defendants pursuant to Rules 10.1 or 10.2 does not require a change of judge as to the other defendants, even though such notice of change of judge may result in severance for trial purposes.

b. Proceedings on Transfer. When a transfer is ordered, the judge or clerk shall transmit to the new judge all papers in the proceeding. In addition, if the case is transferred to another county, the clerk shall transmit to the clerk of the court to which the proceedings are transferred all papers in the proceeding, any evidence in the clerk's custody, and any appearance bond or security taken, and the sheriff shall transfer custody of the defendant, if in custody, to the sheriff of the county to which the proceeding is transferred. The file shall retain the case number and designation of the originating county.

Rule 10.5 mandates that once the notice of change of judge is filed, the case must be “immediately” transferred to the presiding judge for reassignment. Once the notice has been filed, the challenged judge may not proceed further in the action, except to make temporary orders as are necessary in the interest of justice while the action is being transferred by the presiding judge. Rule 10.6. *See State v. City Court of City of Tucson*, 150 Ariz. 99, 102, 722 P.2d 267, 270 (1986).

An original trial judge does not have to be disqualified or even subject to disqualification for another judge, even one in another county, to be substituted for the original trial judge. *Bellamack v. State*, 37 Ariz. 344, 347, 294 P. 622, 623 (1930) citing Ariz. Const. § 1, art. VI. In *Bellamack*, the trial judge called in a judge from another county to sit on the defendant's trial for assault with intent to commit murder. The original trial judge had not been disqualified. Following his conviction, the defendant appealed contending that this substitution of the out of county judge was improper and warranted reversal. The Arizona Supreme Court disagreed, noting that a judge "may, at his pleasure and option, call in an outside judge to hold a superior court hearing in his county." *Id.* at 348, 294 P. at 623.

When a case is transferred to another judge, all documents and other related items are to be transferred to the newly assigned judge. Ariz. R. Crim. Proc. 10.5(b). As noted in *Roberts v. State*, 17 Ariz. 159, 149 P. 380 (1915), this does not mean that the transfer of inaccurate documents gives rise to a sustainable appeal. In *Roberts*, the defendant's murder case was transferred from Graham to Gila County. Included in the documents which were transferred to Gila County were copies of the indictment which had an incorrect date shown on them. Following his conviction, the defendant claimed that the use of this erroneous indictment deprived him of his right to trial on accurate information. The Arizona Supreme Court disagreed, finding that the erroneous date was functionally a harmless error which had little or no bearing on the merits of the evidence against the defendant.

In *State v. Watkins*, 125 Ariz. 570, 611 P.2d 923 (1980), a defendant moved to disqualify Judge A for cause. His challenge was granted and the case was transferred to presiding Judge B, who reassigned the case to Judge C. The defendant then filed a peremptory change of judge against Judge C. By that time, Judge A had become the presiding judge; under Rule 10.5, Ariz. R. Crim. P., Judge A reassigned the case to Judge D. The defendant argued that because he had successfully challenged Judge A for cause, that judge was prohibited from having any involvement whatsoever in his case. The Arizona Supreme Court disagreed, stating that a presiding judge is compelled by the Rules of Criminal Procedure to reassign cases when a party has challenged the originally assigned judge. This action is a “non-discretionary, ministerial duty” and it did not “amount to such appearance of impropriety as requires disqualification.” *Id.* at 575, 611 P.2d at 928.